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No. 77-1754

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILDLIFE PRESERVES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The judgment order of the court of appeals is unreported and is reproduced in the appendix to the Petition at 1a.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1978 (Pet. App. 2a), and a timely petition for rehearing *en banc* was denied on February 9, 1978 (Pet. App. 3a). On May 9, 1978, Mr. Justice Brennan granted an extension of time to file the petition for a writ of certiorari to and including June 9, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).[1]

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[1]Pet. 2. The proper statutory basis for invoking this Court's jurisdiction is 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court, in a condemnation proceeding held before a jury, abused its discretion by denying, as too speculative, a landowner's proffer of evidence on the probability of a zoning change, where the only evidence to support such a probability was the fact of the landowner's state court lawsuit challenging the zoning ordinance's constitutionality, admittedly filed in anticipation of the federal condemnation proceeding.

STATEMENT

1. Petitioner, Wildlife Preserves, was the owner of approximately 616 acres of land in Harding Township, New Jersey. Petitioner's property was classified "R-1" in 1967, which limited the property's use to one-family private dwellings or related structures on a minimum lot size of 3 acres.[2] Its land was retained in its natural state as a wildlife sanctuary.

"[C]oncededly in anticipation of the imminent condemnation proceedings in the Federal Court,"[3] whereby the United States intended to acquire a portion of petitioner's property for inclusion in the Great Swamp National Wildlife Refuge, petitioner filed a complaint on Novermber 20, 1970, in the Superior Court of New Jersey seeking to have the existing Harding Township zoning classification declared invalid under the New Jersey Constitution and the Fourteenth Amendment. On March 2, 1971, the United States acquired title by condemnation

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[2]See Appendix on Behalf of Petitioner, filed in the court of appeals, p. 83a (hereinafter "C.A. App.").

[3]C.A. App. 192a. Petitioner was advised by the United States on October 8, 1970, that it intended to condemn its land within the year. See Exhibit III, History of Negotiations, filed in the court of appeals.

of 551 acres of petitioner's property. The Superior Court of New Jersey concluded that petitioner could not challenge the propriety of a zoning classification for land it no longer owned. However, it also concluded that petitioner's continued ownership of approximately 66 acres permitted it to challenge the original R-1 zoning classification, but only in the state court. The Superior Court stated that "the challenge to the R-1 zone [is not] one which should be litigated in the Federal condemnation proceeding, as this challenge [to the R-1 zoning classification] will have effects far beyond the condemned properties and will involve questions of constitutional law with which this Court is probably far more familiar" (C.A. App. 90a).

On June 12, 1973, while petitioner's action was still pending in the Superior Court, Harding Township amended its zoning ordinance and placed petitioner's remaining 66 acres in a "farm, recreation and conservation zone" (C.A. App. 194a). Petitioner moved to amend its state court complaint to include an attack on the new ordinance, but later withdrew the motion. (*ibid.*) The Superior Court dismissed petitioner's complaint as moot, expressly pretermitting a determination of the constitutionality of the original R-1 zoning classification (C.A. App. 175a). In its opinion, however, the Superior Court also found that: (1) despite the fact the R-1 zoning classification had been in effect since 1967, petitioner never made any complaint about it (C.A. App. 184a-185a); and (2) petitioner, as a nonprofit corporation under New Jersey law, may be unable to use its property for any purpose other than that to which it has been dedicated (C.A. App. 189a).

2. In January 1974, the district court partially granted petitioner's motion to present evidence on the probability of a zoning change. It stated that "if, as of the date of

taking, there exists a reasonable probability of a change in the zoning ordinance in the reasonably near future, such is a proper factor for consideration in valuing the condemned land" (Pet. App. 6a). The ruling was conditioned, however, upon petitioner's satisfying the court that there was sufficient evidence to submit this alleged element of value to the jury, particularly in light of the "unique nature" (Pet. App. 7a-8a) of petitioner's contention (Pet. App. 8a).

During the condemnation hearing,[4] petitioner acknowledged that its state court lawsuit was the "vehicle for determination" (C.A. App. 121a) by its expert witnesses that a zoning change was probable, and that these expert witnesses would "conclude that a hypothetical buyer, knowing about this lawsuit, would have taken into account the probability of rezoning as a result of the lawsuit." (*ibid.*). In light of that disclosure, the district court denied petitioner's request to present evidence and expert testimony to the jury on the probability of a zoning change premised on the unconstitutionality of the R-1 zoning classification. It concluded that petitioner's contention would impermissibly require experts to testify on matters of law (Pet. App. 19a-20a) and the jury to pass upon the constitutionality of the R-1 zoning ordinance. Moreover, the evidence petitioner relied upon was too speculative for the court or the jury to consider.[5] The

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[4]Prior to the hearing, the United States and petitioner entered into an agreement as to the value of the 551 acres, with the reservation that if petitioner prevailed on its "unconstitutionality" contention, then a newly impaneled jury would determine only the incremental value, if any, attributable to the zoning change above the already agreed value.

[5]The district court's final judgment of March 1, 1977, is reproduced as an appendix to this brief. It was not included in the petitioner's appendix.

district court did permit petitioner to introduce into the record the testimony its expert witnesses would have given so that it could be reviewed by the court of appeals.

The court of appeals, after reviewing the briefs and record, affirmed the district court's decision based on this Court's decision in *United States* v. *Reynolds*, 397 U.S. 14, and its own decision in *United States* v. *3,544 Acres in Philadelphia County, Pennsylvania*, 147 F. 2d 596, both relied upon by the United States (Pet. App. 1a). A petition for rehearing *en banc* was denied (Pet. App. 3a).

ARGUMENT

1. The district court gave petitioner the opportunity to proffer evidence, including a summary of expert testimony, on the alleged unconstitutionality of the R-1 zoning classification. The evidence was based on the presumed occurrence of a future "legal" event; namely, a decision by a New Jersey State court that the R-1 zoning classification was unconstitutional. The *only fact* in existence at the time the United States condemned petitioner's property to support such a presumption was the pendency of petitioner's state court lawsuit. Consequently, the testimony of petitioner's expert witnesses would have been directed toward proving a legal conclusion (*i.e.*, the R-1 classification would be changed because it violated the New Jersey and federal constitutions) or would have proceeded on a legal presumption (*i.e.*, the R-1 classification was unconstitutional).[6]

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[6]*E.g.*, Mr. Zimmerman (Pet. App. 29a) would render "an opinion as to the reasonableness of the zoning * * * and * * * the most appropriate and most probable use of the subject property as a result of change or *invalidation* of the R-1 Zoning * * *" (*id.* at 30a, emphasis added). Moreover, he would state (1) that "[t]he consensus of opinion was that * * * [R-1 zoning was] unreasonable; and likely

The district court correctly concluded that testimony on legal matters was beyond the competence of a witness, *United States* v. *Turner*, 11 How. 662, 667; *Huff* v. *United States*, 273 F. 2d 56, 61 (C.A. 5); *Lamar* v. *Micou*, 114 U.S. 218, 223, and was based on a future event "which while possible [was] not shown to be reasonably probable * * *." *Cameron Development Corp.* v. *United States*, 145 F. 2d 209, 210 (C.A. 5); *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 274, 280-281.[7] The district

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to be declared *invalid by a court* * * *" (*id.* at 32a; emphasis added); (2) the zoning ordinance "would be changed by virtue of the pending Court action" (*id.* at 33a); and (3) the ordinance "in fact constituted, a denial of a reasonable * * * use" (*ibid.*) and "would not satisfy the general welfare criteria of zoning" (*id.* at 34a). Furthermore, Mr. Zimmerman's proposed testimony indicates he would testify on "whether the uses permitted [by the R-1 zoning] satisfy *the statutory purposes of zoning* and in particular promote the general welfare] * * *" (*id.* at 32a; emphasis added). Cf. *Huff* v. *United States*, *supra*, 273 F. 2d at 61 (testimony of Herman Cherry).

Finally Mr. Scheil's (Pet. App. 45a), Mr. Selder's (Pet. App. 50a) and Mr. Lasser's (Pet. App. 38a) testimony assumes that the property can be developed pursuant to a zoning classification other than R-1. Cf. *Scott Lumber* v. *United States*, 390 F. 2d 388, 395 (C.A. 9).

[7]Petitioner relies upon *State* v. *Market Associates*, 340 A. 2d 663 (App. Div. N.J.) for the proposition that where a "challenge" to zoning regulations was pending at the time of the filing of the condemnation, the court would determine, in the eminent domain proceeding, the likelihood that those zoning regulations would be invalidated" (Pet. 15). Presuming the law of New Jersey has application in a federal condemnation proceeding, petitioner's reliance on *Market Associates* is misplaced. In *Market*, the court noted the "unusual, almost unique, circumstances present in this case" (340 A. 2d at 664); namely, that the zoning regulation governing the condemned property had already been declared unconstitutional in an earlier judicial proceeding (340 A. 2d at 665).

In a companion case to *Market* involving the petitioner, *State* v. *Wildlife Preserves, Inc.*, 340 A. 2d 665 (App. Div. N.J.), the New Jersey court reached a contrary result. The court there noted that the zoning regulations affecting the landowner's property had been in

court properly exercised its discretion in a condemnation proceeding, *United States* v. *Reynolds*, 397 U.S. 14, 19-20, by excluding this proffered evidence as too speculative to submit to a jury. *Olson* v. *United States*, 292 U.S. 246, 255-257; *United States* v. *3,544 Acres in Philadelphia County, Pennsylvania*, 147 F. 2d 596, 598 (C.A. 3). No error of law is involved which warrants review by this Court.

2. In the court of appeals, the United States acknowledged that its decision to file a declaration of taking was, in part, the basis for the state court's determination that petitioner could no longer prosecute its claims of unconstitutionality. There is however, nothing in the record to suggest, as petitione, now does (Pet. 10), that this decision by the United States was the result of "collusion" with Harding Township. On the contrary, the record demonstrates that petitioner: (1) filed its state court action "concededly in anticipation of the imminent condemnation proceedings in the Federal Court" (C.A. App. 192a; see n. 3, *supra*); and (2) had never formally complained about the R-1 zoning although it was in existence for approximately 4 years prior to the taking (C.A. App. 184a-185a). See *State* v. *Wildlife Resources, Inc.*, *supra*, n. 7. Moreover, the State court found that petitioner, as a nonprofit New Jersey corporation, may be unable to use its property for any purpose other than that to which it has been dedicated (*i.e.*, wildlife preserve),

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effect for 3 years without challenge and that "as of the date of this taking the likelihood that the controlling use regulations would be declared invalid was exceedingly remote, at best * * *" (340 A. 2d at 666). Moreover, throughout the trial, the landowner had taken the "undeviating position * * * that, by reason of its peculiar physcial characteristics, the land taken was not susceptible to the construction of buildings on it, but rather 'has to be used in its natural state' " (340 A. 2d at 666-667). Consequently, the court concluded that he could not claim the land was suscepitable of a different use.

regardless of any zoning change. Cf. *State* v. *Wildlife Preserves, Inc., supra*, 340 A. 2d at 666-667. These factors indicate the very speculative nature of petitioner's contentions concerning the constitutionality of the R-1 zoning classification and the propriety of the district court's decision.

CONCLUSION

The petition for a writ certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE,
Solicitor General.

JAMES W. MOORMAN,
Assistant Attorney General.

JACQUES B. GELIN,
NEIL T. PROTO,
Attorneys.

JULY 1978.

DOJ-1978-08

ORIGINAL FILED
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ANGELO W. LOCASCIO, CLERK

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 295-7

HON. GEORGE H. BARLOW

UNITED STATES OF AMERICA,

Plaintiff,

v.

376.2 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF MORRIS, STATE OF NEW JERSEY, HAZEL DUDLEY, ET AL.,

Defendants.

FINAL JUDGMENT

This matter, a condemnation proceeding instituted by the United States of America for determination of the just compensation to be awarded to Wildlife Preserves, Incorporated (hereinafter the Condemnee) as the former owner of Tract 219D which was taken by the Government and which is more particularly described in the Declaration of Taking herein, came on for final hearing on November 8, 1976; and the Court at that time having considered the submissions and arguments of counsel, and having ruled that the submission to the jury of the evidence proffered by the Condemnee regarding the probability of a zone change in the Township of Harding would require the jury to impermissibly pass upon the constitutionality of the existing zoning ordinance, and having determined that the jury's consideration of the probability of a zone change based upon the Condemnee's proffer of proof would be too speculative; and the parties having stipulated a verdict of $1,150.00 per acre as the value of Condemnee's property, without consideration of the element of probability of zone change, and having further stipulated that such a verdict shall be without prejudice to the Condemnee's right to appeal from the Court's ruling regarding the submission to the jury of evidence of a probable zone change,

IT IS on this 1st day of March, 1977,

ORDERED and ADJUDGED as follows:

1. Condemnee is not permitted to present to the jury its proffered evidence regarding the probability of a zone change in the Township of Harding, in accordance with the Court's ruling as read into the transcript of these proceedings on November 8, 1976.

2. That, absent the element of probability of zone change, the sum of $254,840.00 is the full, fair and just compensation payable by the United States of America

for the taking of Tract 219D, together with any improvements thereon and appurtances thereunto belonging, and

IT APPEARING to the Court that the aggregate sum of $188,600.00 estimated compensation, was disbursed to the Condemnee pursuant to an Order of this Court dated July 13, 1971, it is therefore

ORDERED, ADJUDGED and DECREED that a deficiency in the amount of $66,240.00 exists between the amount of compensation disbursed and the amount of compensation adjudicated herein; it is further

ORDERED, ADJUDGED and DECREED that the plaintiff be and is hereby directed to deposit into the registry of this Court to the credit of the Condemnee, the sum of $66, 240.00, together with interest thereon at the rate of 6% per annum from March 2, 1971 to the date of its deposit, inclusive; it is further

ORDERED, ADJUDGED and DECREED that title to the estate set forth in the Declaration of Taking in the parcel of land described as Tract 219D vested in the United States of America on the date of the filing of the Declaration of Taking; it is further

ORDERED, ADJUDGED and DECREED that all taxes, assessments, and other such governmental charges, and all other liens and claims of whatsoever nature existing against said property on the date of the filing of the Declaration of Taking transferred therefrom to the funds deposited in the Registry of this Court, to the end that the United States of America may have an unencumbered estate, right, title and interest in said property; it is further

ORDERED, ADJUDGED and DECREED that upon deposit of the sum of $66,240.00, together with interest thereon as aforesaid, the Clerk of this Court shall, without further Order of this Court, distribute said sum and interest thereon to Wildlife Preserves, Incorporated and transmit the same to it in care of its attorney of record, Laurence B. Orloff, Esq., Orloff, Lowenbach, Stifelman & Siegel, Gateway One, Newark, New Jersey 07102; and it is further

ORDERED, ADJUDGED and DECREED that after the sum of $66,240.00, together with interest thereon, has been disbursed to the Condemnee, Tract 219D is to be closed and stricken from the docket in this proceeding, subject to the right of the Condemnee to prove an enhancement of value over and above that stipulated as the verdict herein, attributable to the probability of rezoning in the event that the United States Court of

Appeals for the Third Circuit determines that the exclusion of the Condemnee's evidence on the probability of rezoning described above was improper.

/s/ George H. Barlow
GEORGE H. BARLOW, JUDGE
UNITED STATES DISTRICT COURT

The undersigned hereby agree to the form of the within Final Judgment.

ORLOFF, LOWENBACH,
STIFELMAN & SIEGEL
Attorneys for Condemnee

By /s/ Laurence B. Orloff
LAURENCE B. ORLOFF

JONATHAN L. GOLDSTEIN
United States Attorney
Attorney for Plaintiff

By /s/ Z. Lance Samay
Z. LANCE SAMAY
Assistant U. S. Attorney
Chief, Civil Division

I hereby certify that the foregoing is a TRUE COPY of the original on file in my office.

Angelo W. Locascio,
Clerk